No. 13-2661

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 23, 2013
DEBORAH S. HUNT, Clerk

KEITH MAXEY, et al.,

Plaintiffs-Appellees,

v.

RICK SNYDER, in his Official Capacity as Governor of the State of Michigan, et al.,

Defendants-Appellants.

O R D E R

Before: ROGERS, COOK, and GRIFFIN, Circuit Judges.

The State of Michigan appeals the district court's November 26, 2013 order directing it to create an administrative structure by December 31, 2013, for the purpose of processing and determining the appropriateness of paroles for prisoners sentenced to life without parole for crimes committed as juveniles. On or before January 31, 2014, the State must submit to the district court a program and process compliant with the specifics set forth in the order. The State moves to stay the November 26, 2013 order pending the outcome of its appeal. The district court has denied a similar motion. Plaintiffs oppose a stay and move to dismiss the appeal.

Before we consider the merits of the State's motion, we must decide whether we have jurisdiction in this matter. A decision is final for purposes of 28 U.S.C. § 1291 if it disposes of all claims and parties on the merits and leaves nothing for the district court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). The November 26, 2013 order directs the State to craft a remedy that the district court may or may not approve. It does not finally resolve the plaintiffs' requests for relief and may not be appealed pursuant to § 1291.

The question remaining "is whether the order effectively operates as an 'injunction'—which is what 28 U.S.C. § 1292(a)(1) permits us to review on an interlocutory basis." *Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007). In considering this issue, we focus on the nature of the order, and not the label attached to it. *N.E. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006). "Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). The November 26, 2013 order acts as a mandatory injunction requiring affirmative action and affects an important interest of the State. Therefore, we conclude that the State may seek immediate appellate review of that order. *See, e.g.*, *Cooey v. Strickland*, 588 F.3d 921, 923 (6th Cir. 2009).

Turning to the merits, the State "bears the burden of showing that the circumstances justify" our exercise of discretion to grant a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). In addressing the motion, we consider the following factors: (1) whether the State has made a "strong showing that [it] is likely to succeed on the merits"; (2) whether it will be "irreparably injured absent a stay"; (3) "whether issuance of the stay will substantially injure the other parties interested in proceeding"; and (4) "where the public interest lies." *Id.*; *see also Serv. Employees Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id*. at 2460. Under Michigan law, first-degree murder—the offense for which all plaintiffs were convicted—carries a statutory penalty of "imprisonment for life." M.C.L. § 750.316(1). The first-degree murder statute is silent as to parole eligibility. *See id.* Parole eligibility is governed by a separate statute, M.C.L. § 791.234, a subsection of which makes those convicted of first-degree murder ineligible for parole. *See* M.C.L. § 791.234(6)(a). Based on *Miller*, the district court declared that M.C.L. § 791.234(6)(a) is unconstitutional as applied to those who were under the age of 18 at the time their crime was committed and, on that basis, has ordered the state to begin the process of correcting the prohibition on parole that § 791.234(6)(a) imposes.

The Supreme Court "has held that a prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.'" *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). "He must seek federal habeas corpus relief (or appropriate state relief) instead." *Id*. If a conviction for a particular crime requires a sentence of life without parole, an action demanding consideration for parole would appear to be an attack on the sentence itself, which is something that should not be done in a § 1983 setting. The State argues that § 1983 is being used to apply *Miller* retroactively and that the district court has ordered relief in favor of persons who are not class members.

"[A] party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal." *Michigan Coal.*, 945 F.2d at 153. However, "a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent

the stay. Simply stated, more of one excuses less of the other." *Id.* (internal citations omitted). A movant is required, however, to show, at a minimum, "serious questions going to the merits." *Id.* at 154 (internal citation and quotation marks omitted). Here, the State has met this standard because the harm the State would suffer is significant in light of the sweeping, overbroad nature of the order.

Specifically, in evaluating the harm that will occur depending on whether or not a stay is granted, we note that the November 26, 2013 order requires the State to give notice within the next nine days to approximately 360 inmates that their eligibility for parole will be considered in a meaningful and realistic manner. And within that same time period, prisoners sentenced to life imprisonment without parole for crimes committed as juveniles must be provided any educational or training program which is otherwise available to the general prison population. This is a remarkably short amount of time for compliance, given the scope of the undertaking. Moreover, even though this case was filed as a class action, the district court never certified a class; nonetheless, the order applies to 360 inmates. Although defendants raise a host of additional issues, the district court clearly erred by ordering parole hearings for all prisoners who were sentenced for first-degree murder as juveniles and have served at least 10 years in prison, even though the plain language of M.C.L. § 791.234(7)(a) specifies that prisoners convicted of a life sentence after 1992 and who were not convicted of an M.C.L. § 791.234(6) offense are eligible for parole only after fifteen years.

For these reasons, we conclude the State has demonstrated a "likelihood of reversal" and that it would suffer significant harm in light of the overbroad nature of the district court's order. *Michigan Coal.*, 945 F.2d at 153-54. We therefore conclude that the equities weigh in favor of granting a stay.

The motion for a stay is **GRANTED.** Plaintiffs' motion to dismiss is **DENIED**.

ENTERED BY ORDER OF THE COURT

Clerk